

311. In view of our decision to treat a BOC affiliate as a "successor or assign" of the BOC if the BOC transfers network elements to the affiliate, we find it unnecessary at this time to adopt additional nondiscrimination regulations applicable to section 272 affiliates. A section 272 affiliate that is not deemed a "successor or assign" of a BOC would nevertheless be subject to the obligations imposed by section 202 -- which prohibits common carriers from, among other things, engaging in "unjust and unreasonable" practices with respect to the provision of interstate services. Moreover, BOC interLATA services affiliates that offer intrastate interLATA telecommunications services would be subject to corresponding nondiscrimination obligations that state statutes and regulations typically impose on common carriers. We conclude based on the current record that these existing requirements should be adequate to protect competition and consumers against anticompetitive conduct by a BOC section 272 affiliate.

312. Integrated affiliates. Numerous commenters also request that we address whether the separate affiliate safeguards imposed by section 272 prohibit a section 272 affiliate from offering local exchange service through the same corporate entity. Based on our analysis of the record and the applicable statutory provisions, we conclude that section 272 does not prohibit a section 272 affiliate from providing local exchange services in addition to interLATA services, nor can such a prohibition be read into this section.⁸¹⁸ Specifically, section 272(a)(1) states that--

A Bell operating company (including any affiliate) which is a local exchange carrier that is subject to the requirements of section 251(c) may not provide any service described in [section 272(a)(2)] unless it provides that service through one or more affiliates that . . . are separate from any operating company entity that is subject to the requirements of section 251(c) . . .

We find that the statutory language is clear on its face -- a BOC section 272 affiliate is not precluded under section 272 from providing local exchange service, provided that the affiliate does not qualify as an incumbent LEC subject to the requirements of section 251(c). Because the text and the purpose of the statute are clear, there is no need, as CCTA suggests,⁸¹⁹ to resort to legislative history.⁸²⁰ We also agree with Ameritech that a BOC affiliate should not be deemed an incumbent LEC subject to the requirements of section 251(c) solely because it offers local exchange services; rather, section 251(c) applies only to entities that meet the definition of an incumbent LEC under section 251(h).⁸²¹ Section 251(h)(1) defines an incumbent LEC as, inter alia, a local exchange carrier that: (1) on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service, and (2) was a member of the National Exchange

⁸¹⁸ See, e.g., PacTel Oct. 23 Ex Parte at 1.

⁸¹⁹ CCTA Dec. 2 Ex Parte at 4.

⁸²⁰ See, e.g., Darby v. Cisneros, 113 S.Ct. 2539, 2545 (1993); Connecticut Nat'l Bank v. Germain, 112 S.Ct. 1146, 1149 (1992).

⁸²¹ Ameritech at 58 n.68.

Carrier Association (NECA) or becomes a successor or assign of such a member.⁸²² Because no BOC affiliate was a member of NECA when the 1996 Act was enacted, such affiliates may be classified as incumbent LECs under this statutory provision only if they are successors or assigns of their affiliated BOCs. Alternatively, under section 251(h)(2), if the Commission determines that a carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by the incumbent LEC, and such carrier has substantially replaced an incumbent LEC, such carrier may be treated by rule as an incumbent LEC for purposes of section 251.⁸²³ We find no basis in the record of this proceeding to find that a BOC affiliate must be classified as an incumbent LEC under section 251(h)(2) merely because it is engaged in local exchange activities. Absent such a finding, BOC affiliates that are neither one of the Bell operating companies listed under 153(4)(A), nor a successor or assign of any such company, are not subject to the separation requirements of section 272.

313. Furthermore, we conclude that section 251 does not preclude section 272 affiliates from obtaining resold local exchange service pursuant to section 251(c)(4) and unbundled elements pursuant to section 251(c)(3), because the statute does not place any restrictions on the types of telecommunications carriers that may qualify as "requesting carriers." We disagree with CCTA's assertion that section 272 affiliates cannot be treated as requesting carriers, because such affiliates are "part of the standard for determining nondiscriminatory interconnection by the [incumbent LEC] for all other telecommunications carriers."⁸²⁴ The fact that a determination of whether an incumbent LEC provides nondiscriminatory access may be based on a comparison of the access that the incumbent LEC provides itself or its affiliate does not preclude such affiliate from being a "requesting carrier" under section 251. There is nothing inconsistent with both requiring nondiscriminatory access and at the same time allowing an affiliate to be a requesting carrier. Moreover, we find nothing in the statute or in the First Interconnection Order that limits the definition of "requesting carrier" to non-affiliates. Thus, section 272 affiliates cannot be precluded under section 251 from qualifying as "requesting carriers" that are entitled to purchase unbundled elements or retail services at wholesale rates from the BOC.

314. We further conclude that section 272(g)(1) cannot be read as imposing a limitation on the ability of section 272 affiliates to exercise their rights under section 251(c)(3). We are not persuaded by AT&T's argument that, because section 272(g)(1) sets forth limited conditions under which section 272 affiliates may "market or sell" local exchange services, allowing those affiliates to purchase unbundled elements is inconsistent with the Act.⁸²⁵ Rather, we agree with CCTA that section 272(g)(1) speaks only to marketing issues, and does not address the conditions

⁸²² See 47 U.S.C. § 251(h)(1).

⁸²³ 47 U.S.C. § 251(h)(2); see also First Interconnection Order at ¶ 1248.

⁸²⁴ CCTA Dec. 12 Ex Parte at 2.

⁸²⁵ AT&T at 22. AT&T also argues this prohibition is part of the operate independently requirement of section 272(b)(1). Id. We address the meaning of that term supra in part IV.B.

under which a section 272 affiliate may provide local exchange services.⁸²⁶ Furthermore, we find AT&T's claim that allowing section 272 affiliates to provide local exchange service through unbundled elements will "artificially and decisively slant [the] playing field in the BOC's favor" unpersuasive,⁸²⁷ because other telecommunications carriers will be able to provide local exchange service through unbundled elements on the same terms and conditions. AT&T's concern that the affiliate will be able to avoid access charges by obtaining the unbundled elements appears to be premised on the view that access charges are currently too high.⁸²⁸ The issue of reforming access charges will, however, be addressed in a separate proceeding.⁸²⁹ Moreover, we conclude that MCI's argument -- that opportunities for discrimination and cross-subsidy are greater when the BOC provides network elements to its affiliate than when it provides resold services -- is speculative.⁸³⁰ To the extent that concerns over discrimination arise, there are safeguards in sections 251 and 252 to address such concerns.⁸³¹ We therefore decline to distinguish between a section 272 affiliate's ability to provide local service by reselling BOC local exchange service and its ability to offer such service by purchasing unbundled elements from the BOC.

315. We also conclude as a matter of policy that regulations prohibiting BOC section 272 affiliates from offering local exchange service do not serve the public interest. The goal of the 1996 Act is to encourage competition and innovation in the telecommunications market. We agree with the BOCs that the increased flexibility resulting from the ability to provide both interLATA and local services from the same entity serves the public interest, because such flexibility will encourage section 272 affiliates to provide innovative new services.⁸³² To the extent that there are concerns that the BOCs will unlawfully subsidize their affiliates or accord them preferential treatment,⁸³³ we reiterate that improper cost allocation and discrimination are prohibited by existing Commission rules and sections 251, 252, and 272 of the 1996 Act, and that predatory pricing is prohibited by the antitrust laws. Our affiliate transaction rules, as modified by our companion Accounting Safeguards Order, address the BOCs' ability to engage in improper cost allocation. The rules in this Order and our rules in our First Interconnection Order and our Second Interconnection Order ensure that BOCs may not favor their affiliates. In sum, we find no basis in the record for concluding that competition in the local market would be harmed if a

⁸²⁶ CCTA Dec. 2 Ex Parte at 3.

⁸²⁷ See AT&T Oct 15 Ex Parte at 2.

⁸²⁸ Id.

⁸²⁹ See Access Charge Reform NPRM.

⁸³⁰ MCI Nov. 1 Ex Parte at 2.

⁸³¹ See, e.g., Ameritech Sept. 19 Ex Parte at 3.

⁸³² See, e.g., PacTel Oct. 23 Ex Parte at 1-2; Ameritech Sept. 19 Ex Parte at 2-3.

⁸³³ NCTA at 10; CCTA at 7, 10; Teleport at 3-5, 8-9; Ohio Commission at 7.

section 272 affiliate offers local exchange service to the public that is similar to local exchange service offered by the BOC.

316. Although we conclude that the 1996 Act authorizes section 272 affiliates to purchase unbundled elements, we emphasize that BOC facilities and services provided to section 272 affiliates must be made available to others on the same terms, conditions, and prices provided to the BOC affiliate pursuant to the nondiscrimination requirements of sections 272 and 251(c)(3).⁸³⁴ Thus, if a BOC affiliate is a requesting carrier under section 251, the BOC is required to treat unaffiliated requesting carriers in the same manner that the BOC treats its affiliate, unless the unaffiliated entity has requested different treatment.⁸³⁵ For example, if a BOC were to provide its section 272 affiliate with access to operational support systems (OSS) functions via a different method or system than it provides to requesting carriers under section 251, we would regard such discriminatory treatment as a violation of section 251(c)(3).⁸³⁶ We believe such nondiscrimination requirements will prevent BOCs from providing special treatment to their affiliates.

317. State regulation. As mentioned above, several BOCs have already submitted applications to state regulatory commissions seeking authority to provide both local exchange services and interLATA services from the same affiliate.⁸³⁷ Although we conclude that the 1996 Act permits section 272 affiliates to offer local exchange service in addition to interLATA service, we recognize that individual states may regulate such integrated affiliates differently than other carriers.⁸³⁸

⁸³⁴ Section 251(c)(3) requires incumbent LECs to provide access to network elements on rates, terms and conditions that are just, reasonable, and nondiscriminatory. 47 U.S.C. § 251(c)(3). See also First Interconnection Order at ¶¶ 298-316.

⁸³⁵ See AT&T at 32-33.

⁸³⁶ First Interconnection Order at ¶¶ 504-528. Therefore, if BOCs are providing access to pre-ordering, ordering, provisioning, maintenance and repair, and billing functions to competing providers of local service through a separate system or "gateway" than they provide for themselves internally, then the BOC affiliate must use the same separate system or "gateway" in order to obtain access to these OSS functions.

⁸³⁷ Teleport at 5. The Ohio and Michigan commissions confirm in their comments that they have already received requests from BOC 272 affiliates for authorization to offer local exchange services in conjunction with interLATA services. Michigan Commission at 4-6; Ohio Commission at 6-8. See also CCTA Dec. 2 Ex Parte at 2 (asserting that PB COM has filed for authority in California to provide local exchange services, interLATA and intraLATA services, and discretionary services on both a facilities and resale basis).

⁸³⁸ See, e.g., Ohio Commission at 6 n.6.

IX. ENFORCEMENT

A. Reporting Requirements under Section 272

1. Background

318. BOCs are required under Computer III to provide information to third parties regarding changes to the network and new network services and to report periodically on the quality and timeliness of installation and maintenance.⁸³⁹ We sought comment in the Notice on what requirements or mechanisms were necessary to facilitate the detection of violations of the separate affiliate and nondiscrimination requirements of section 272.⁸⁴⁰ We asked parties to comment on whether we should impose reporting and other requirements on BOCs analogous to those requirements imposed in the Computer III and subsequent ONA proceedings to ensure compliance with section 272 requirements.⁸⁴¹ We specifically requested comment on whether these requirements are sufficient to implement the section 272(c)(1) nondiscrimination requirement.⁸⁴²

2. Comments

319. BOCs and USTA generally argue against the imposition of additional reporting requirements in addition to those required in the 1996 Act to facilitate detection and adjudication of violations of section 272 requirements.⁸⁴³ To the extent the Commission does impose additional requirements, several parties maintain, it should model them after Computer III/ONA requirements.⁸⁴⁴ Many commenters, including BOC competitors, argue that additional reporting requirements are needed to ensure BOC compliance with the requirements of section 272.⁸⁴⁵ TIA

⁸³⁹ See, e.g., Computer III Phase II Order, 2 FCC Rcd at 3091; BOC ONA Reconsideration Order, 5 FCC Rcd at 3093.

⁸⁴⁰ Notice at ¶ 94.

⁸⁴¹ Id. at ¶ 95.

⁸⁴² Id. at ¶ 75.

⁸⁴³ Bell Atlantic at 9; NYNEX at 63; PacTel at 46-47; SBC at 8-9; U S West at 60; USTA at 32-33.

⁸⁴⁴ PacTel at 46-47; U S West Reply at 30; USTA Reply at 20.

⁸⁴⁵ AT&T at 48; DOJ Reply at 12 (recommending two specific reporting requirements, one to detect cost misallocations and another to detect discrimination in the quantity, quality, and time of service between BOCs and their 272 affiliates); ITAA at 27-28; MCI at 50; Teleport at 15-17 (suggesting quarterly reporting on objective performance standards); TIA at 47-49; TRA at 16-17; Voice-Tel at 5.

contents that if reporting requirements are inadequate, the section 272 safeguards will be rendered ineffective.⁸⁴⁶

320. On the specific issue of whether the reporting and other requirements of Computer III/ONA are sufficient to implement section 272(c)(1), commenters generally advance three alternative views. They argue that: (1) no rules or reporting requirements are necessary to implement section 272(c)(1);⁸⁴⁷ (2) no rules are needed but that if the Commission were to adopt rules, it should extend the existing Computer III reporting and other requirements;⁸⁴⁸ or (3) although the extension of Computer III requirements is necessary, these requirements are insufficient to implement section 272(c)(1) and additional reporting requirements should be imposed.⁸⁴⁹

3. Discussion

321. We conclude that none of the reporting or other requirements of Computer III/ONA is necessary to implement the requirements of section 272(c)(1) at this time. For the same reasons, we further conclude that (with the exception of section 272(e)(1)),⁸⁵⁰ no reporting requirements are needed to facilitate the detection and adjudication of violations of the separate affiliate and nondiscrimination requirements of section 272.⁸⁵¹ As many commenters observe, reporting requirements serve two primary purposes. First, they act to deter potential anticompetitive behavior by requiring BOCs to provide objective proof of their compliance with

⁸⁴⁶ TIA at 47.

⁸⁴⁷ Some parties maintain that no rules are necessary because other statutory provisions developed by Congress (e.g., sections 251(c)(5), 272(b)(5), and 272(d)(2)) are sufficient to protect against discriminatory behavior. Bell Atlantic at 8-9; ITAA at 21; ITI and ITAA Reply at 6 (section 272(c)(1)'s absolute prohibition on discrimination makes detailed regulation unnecessary); USTA at 25; USTA Reply at 13-14. Others argue that no rules are necessary because claims of discrimination are best resolved on a case-by-case basis. Ameritech at 53; NYNEX at 36; NYNEX Reply at 21-22; Sprint at 38.

⁸⁴⁸ PacTel at 32; PacTel Reply at 14; see also SBC at 13-14; cf. Ohio Commission at 9 (supports application of Computer II provisions to prevent discrimination because these require structural separation).

⁸⁴⁹ AT&T at 33 (Computer III rules not fashioned to require equal treatment between a BOC affiliate and its competitor); MCI at 37-38; MCI Reply at 21-22; MFS Reply at 20-21 (section 272(c)(1) goes further than Computer III requirements); Teleport at 14; Time Warner at 23; TIA at 39-40 (existing Computer III rules do not guarantee equal treatment in the use of information between a BOC affiliate and unaffiliated entities); TRA at 17.

⁸⁵⁰ See supra part VI.A; see also infra part XI.

⁸⁵¹ We note that our conclusion is consistent with the Commission's policy to eliminate or reduce reporting requirements wherever possible. See Revision of Filing Requirements, Report and Order, CC Docket No. 96-23, DA 96-1873 (Com. Car. Bur. rel. Nov. 13, 1996) (eliminating thirteen reporting requirements imposed on communications carriers by the Commission's rules and policies and reducing frequency of filing obligations for four other reporting requirements imposed pursuant to Commission orders).

the separate affiliate and nondiscrimination requirements. Second, they enable competitors, as well as the Commission, to detect any potential violations of these requirements. We believe, however, that sufficient mechanisms already exist within the 1996 Act both to deter anticompetitive behavior and to facilitate the detection of potential violations of section 272 requirements.⁸⁵² Nevertheless, we intend to monitor compliance with section 272 requirements and, of course, reserve the ability to undertake appropriate measures in the event that future developments warrant.

322. The requirements of section 272(b), as discussed above, discourage anticompetitive behavior by the BOC by requiring the BOC and its section 272 affiliate to adhere to certain structural and transactional requirements, including the requirement to "operate independently." We therefore conclude that it is unnecessary to impose the Computer III/ONA reporting requirements in order to implement the separate affiliate and nondiscrimination requirements of section 272. Further, we note that even some commenters that support imposing Computer III/ONA reporting requirements on BOCs admit that they do not seem useful or practical.⁸⁵³

323. We find, instead, that several of the disclosure requirements established in the 1996 Act will facilitate the detection of anticompetitive behavior. Section 272(d), for example, requires that a BOC obtain and pay for a biennial joint federal/state audit to determine whether it has "complied with [section 272] and the regulations promulgated under this section. . . ."⁸⁵⁴ We conclude that this broad audit requirement is intended to verify BOC compliance with the accounting and non-accounting requirements of section 272, as implemented.⁸⁵⁵ In addition, we note that, pursuant to section 271(d)(3)(B), a BOC may not receive authorization to provide in-region interLATA services until it shows, among other things, that the "requested authorization will be carried out in accordance the requirements of section 272."⁸⁵⁶ In view of these requirements, we reject ITAA's suggestion that BOCs should submit to the Commission section 272 compliance plans, and periodic reports regarding their implementation of those plans, as unnecessarily burdensome.⁸⁵⁷

⁸⁵² Our discussion will be primarily focused on the non-accounting mechanisms that already exist in the Act. Accounting requirements imposed by the Act are discussed in the Accounting Safeguards Order.

⁸⁵³ See AT&T at 33-34, 37; PacTel at 37; PacTel Reply at 15 (citing Commission finding that Computer III/ONA nondiscrimination reports have not disclosed any discrimination in the BOC provision of CPE or resulted in the filing of any formal complaints); Sprint at 41 n.29; Time Warner at 23.

⁸⁵⁴ See 47 U.S.C. § 272(d). This requirement is addressed in the Accounting Safeguards Order.

⁸⁵⁵ See Florida Commission at 5 (a joint audit, if performed according to the guidelines suggested by NARUC, will facilitate detection of separate affiliate and nondiscrimination requirements of section 272).

⁸⁵⁶ 47 U.S.C. § 271(d)(3)(B).

⁸⁵⁷ ITAA at 27-28.

324. In addition, the section 272(b)(5) requirement that all transactions between a BOC and its section 272 affiliate be reduced to writing and made publicly available should serve as a powerful mechanism both to detect violations of the section 272 requirements and to deter anticompetitive behavior. Similarly, we find that our interpretation of section 272(c)(1) as a flat prohibition against discrimination will work in conjunction with the section 272(b)(5) disclosure requirement to deter anticompetitive behavior. Under section 272(c)(1), any difference between the goods, services, and facilities given to a section 272 affiliate and those given to an unaffiliated entity may give rise to a claim of discrimination. Some commenters argue that the requirement of section 272(b)(5) should be extended to encompass not only transactions between a BOC and its section 272 affiliate, but also transactions between a BOC and unaffiliated entities.⁸⁵⁸ We find, however, that section 272(b)(5), by its terms, applies only to the transactions between the BOC and its section 272 affiliate. Extending such a requirement to transactions between a BOC and unaffiliated entities would expand the scope of this section beyond the statutory requirements and is not necessary to detect the type of discrimination that section 272 is intended to prevent. As discussed below, parties may make a request for such reporting requirements in the context of their interconnection negotiations with BOCs. Presented with such a request, the BOC will have the obligation to negotiate this proposal in good faith pursuant to section 251(c)(1).⁸⁵⁹

325. In addition to the requirements of section 272, the Act also imposes other disclosure requirements on the BOCs that, in our view, largely address the concerns cited by parties arguing for additional reporting requirements. For example, section 251(c)(5) requires all incumbent LECs, including BOCs, to disclose publicly information about network changes that will affect a competing service provider's performance or ability to provide service or will affect the incumbent LEC's interoperability with other service providers.⁸⁶⁰ In implementing this requirement in our Second Interconnection Order, we found that this disclosure about network changes "promotes open and vigorous competition" and provides "sufficient disclosure to insure against anticompetitive acts."⁸⁶¹ Similarly, section 273(c)(1) requires BOCs to maintain and file with the Commission full and complete information of the protocols and technical requirements used for network connection, and section 273(c)(4) requires BOCs to provide "to interconnecting carriers providing telephone exchange service, timely information on the planned deployment of telecommunications equipment."⁸⁶²

⁸⁵⁸ DOJ Reply at 12 (Commission should require reporting of costs arising from transactions between third parties and the BOC or its section 272 affiliate); MCI at 50-51; TIA at 48, n.104.

⁸⁵⁹ 47 U.S.C. § 251(c)(1).

⁸⁶⁰ *Id.* § 251(c)(5). For further discussion of this requirement, see Second Interconnection Order at ¶¶ 165-260.

⁸⁶¹ Second Interconnection Order at ¶¶ 171, 173.

⁸⁶² See 47 U.S.C. §§ 273(c)(1), (c)(4). These requirements are addressed in the Manufacturing NPRM.

326. We also find that, beyond the reporting requirements mandated under the 1996 Act, there are other avenues by which a telecommunications carrier may obtain information relevant to detecting anticompetitive BOC conduct. For example, competitive telecommunications carriers, on their own initiative, could seek to incorporate certain performance and quality standards into their negotiated or arbitrated interconnection agreements to ensure that BOCs satisfy their obligation to provide service in a nondiscriminatory manner.⁸⁶³ As noted above, BOCs, like any other incumbent LEC, are obligated to negotiate such requests in good faith pursuant to section 251(c)(1).⁸⁶⁴ Through this process, competitive carriers will be able to tailor the interconnection agreement to include only those reporting requirements that they deem necessary or find to be most useful.⁸⁶⁵ Further, pursuant to section 252(a), BOCs must file all interconnection agreements with the appropriate state commission and under section 252(h) these agreements must be made publicly available; the terms and conditions of these interconnection agreements, therefore, are on public record and available to competitors.⁸⁶⁶ We also note that there are several state utility commissions that, pursuant to state administrative code, require LECs to conform to certain service standards and make service quality reports publicly available.⁸⁶⁷ New York and Virginia, for example, require all LECs to file periodic service quality or standard of service reports.

327. We believe that the reporting requirements required by the 1996 Act, those required under state law, and those that may be incorporated into interconnection agreements negotiated in good faith between BOCs and competing carriers will collectively minimize the potential for anticompetitive conduct by the BOC in its interexchange operations. In addition to deterring potential anticompetitive behavior, these information disclosures will also facilitate detection of potential violations of the section 272 requirements. We, therefore, agree with those parties who argue that there is no need to impose additional reporting requirements at this time. Further, we note that even several parties who advocate the imposition of additional reporting

⁸⁶³ See 47 U.S.C. § 252. We also note that competing carriers, in order to ensure they have a recourse for anticompetitive behavior by BOCs, may seek to include liquidated damage clauses, dispute resolution mechanisms, and other common commercial arrangements into their negotiated or arbitrated agreements.

⁸⁶⁴ 47 U.S.C. § 251(c)(1).

⁸⁶⁵ See, e.g., Letter from Todd F. Silbergeld, Director, Federal Regulatory, SBC to William F. Caton, Acting Secretary, FCC at 2 (filed Nov. 6, 1996) (SBC Nov. 6 *Ex Parte*) (stating that requesting carriers have been sufficiently concerned about service quality and performance levels to have negotiated specific performance standards into interconnection agreements with SWBT).

⁸⁶⁶ 47 U.S.C. §§ 252 (a), (h), (i).

⁸⁶⁷ See, e.g., 83 Ill. Admin. Code tit. 83, § 730 (1996); NJ Admin Code tit. 14, § 10-1-1.10 (1996), NY Comp. Codes R. & Regs. tit. 16, § 603 (1996), Or. Admin R. 860-23-055 (1995); Mo. Code Regs. Ann. tit. 4 § 240-32.070 (1996); Va. Admin. Code tit. 20, § 5-400-100 (1996).

requirements recognize the inherent difficulty of identifying and preventing every type of discrimination through regulatory measures.⁸⁶⁸

328. Finally, we believe that the complaint process will bring violations of section 272 to the attention of the Commission. Congress has established a mechanism in section 271(d) to facilitate the enforcement of the requirements of section 272. Further, as discussed below, if the information necessary to prove a complainant's claim is not publicly-available, the complainant has the opportunity to obtain the necessary documentation from the BOC in the context of an enforcement proceeding.⁸⁶⁹ We expect that BOC competitors will be vigilant in detecting BOC deficiencies and will avail themselves of the expedited complaint process established by section 271(d)(6).⁸⁷⁰

B. Section 271(d)(6) Enforcement Provisions

329. As discussed in the Notice, section 271(d)(6) of the Communications Act gives the Commission specific authority to enforce the conditions that a BOC is required to meet in order to obtain Commission authorization to provide in-region interLATA services. Specifically, section 271(d)(6) states:

(A) COMMISSION AUTHORITY. -If at any time after the approval of an application under [section 271(d)(3)], the Commission determines that a [BOC] has ceased to meet any of the conditions required for such approval, the Commission may, after notice and opportunity for a hearing-

- (i) issue an order to such company to correct the deficiency;
- (ii) impose a penalty on such company pursuant to title V; or
- (iii) suspend or revoke such approval.

(B) RECEIPT AND REVIEW OF COMPLAINTS.-The Commission shall establish procedures for the review of complaints concerning failures by [BOCs] to meet conditions required for approval under [section 271(d)(3)]. Unless the parties otherwise agree, the Commission shall act on such complaint within 90 days.⁸⁷¹

⁸⁶⁸ See, e.g., DOJ Reply at 13; MCI at 50; Letter from Charles E. Griffin, Government Affairs Director, AT&T to William F. Caton, Acting Secretary, FCC at 1 (filed Oct. 3, 1996) (AT&T Oct. 3 Ex Parte).

⁸⁶⁹ See infra part IX.B.4 (discussing burden-shifting).

⁸⁷⁰ See U S West at 61; USTA at 31-33.

⁸⁷¹ We recently initiated a separate proceeding addressing the expedited complaint procedures mandated by this subsection as well as those mandated by other provisions of the 1996 Act. See Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers, CC Docket No. 96-238,

1. Commission's Enforcement Authority under Section 271(d)(6)

a. Background

330. In the Notice, we sought to clarify the relationship between the Commission's authority under section 271(d)(6) and the Commission's existing enforcement authority under sections 206-209 of the Communications Act.⁸⁷² We tentatively concluded that, in the context of "complaints concerning failures by [BOCs] to meet the conditions required for approval under [section 271(d)(3)]," section 271(d)(6) generally augments the Commission's existing enforcement authority. We sought comment on whether, in a situation where a complaint alleges that a BOC has ceased to meet the conditions for approval to provide in-region interLATA telecommunications services and seeks damages as a result of the underlying alleged unlawful conduct, a Commission determination that the BOC has ceased to meet the conditions and the imposition of a section 271(d)(6)(A) sanction would fulfill the Commission's duty to "act on such complaint within 90 days."⁸⁷³

331. In order to approve a BOC's application to provide in-region interLATA services pursuant to section 271(d)(3), the Commission must determine that the BOC: meets the requirements of section 271(c)(1); satisfies the competitive checklist in section 271(c)(2)(B); complies with the requirements of section 272; and demonstrates that the approval of its application is consistent with the public interest, convenience, and necessity.⁸⁷⁴ Section 271(d)(6)(A) sets forth various actions the Commission may take at any time after the approval of an application, and after notice and opportunity for a hearing, if it determines that a BOC has ceased to meet any of these conditions. In the Notice, we stated that the Commission may determine that a BOC has ceased to meet the conditions of its approval under section 271(d)(3) either via the resolution of an expedited complaint proceeding pursuant to section 271(d)(6)(B) or in a proceeding commenced on its own motion.

Notice of Proposed Rulemaking, FCC 96-460, (rel. Nov. 27, 1996) (Enforcement NPRM).

⁸⁷² Section 206 provides that "any common carrier" found to be in violation of the Communications Act shall "be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation." Section 207 of the Communications Act permits any person "damaged" by the actions of any common carrier to bring suit for the recovery of these damages. Section 208(a) authorizes complaints by any person "complaining of anything done or omitted to be done by any common carrier" subject to the Communications Act or its provisions. Section 209 specifies that the Commission will "make an order directing the carrier to pay to the complainant" any damages amount a complainant successfully establishes. 47 U.S.C. §§ 206-209.

⁸⁷³ Notice at ¶ 97.

⁸⁷⁴ See 47 U.S.C. § 271(d)(3).

b. Comments

332. Nearly all the commenters agree with our tentative conclusion that section 271(d)(6) generally augments the Commission's existing enforcement authority.⁸⁷⁵ Commenters also agree that, where a complainant seeks damages or other relief that is not available under section 271(d)(6), the Commission need not decide the question of additional relief in order to "act on" the complaint within 90 days.⁸⁷⁶ In addition, all parties agree that the Commission may determine whether a BOC has ceased to meet the conditions for entry either on its own motion or in the context of a complaint proceeding.⁸⁷⁷

c. Discussion

333. We affirm our tentative conclusion that section 271(d)(6) augments the Commission's existing enforcement authority. We reject both NYNEX's contention that the specific remedies of section 271(d)(6)(A) supersede the general sanctions contained in sections 206-209 of the Act as well as SBC's assertion that there is no statutory basis for applying the provisions of section 206-209 when a violation of section 271(d)(3) has been alleged. As AT&T observes, there is no support in the statute or its legislative history for the assertion that Congress intended to eliminate the damages remedy that applies to all other violations of Title II for violations of sections 271 and 272, especially in light of the competitive concerns that underlie the 1996 Act.⁸⁷⁸ We also conclude that, where a complainant seeks damages as a result of the underlying alleged violative conduct, a Commission determination on whether the BOC has ceased to meet the conditions and the imposition of a section 271(d)(6)(A) sanction, where appropriate, would fulfill the Commission's statutory duty to "act on such complaint within 90 days." Completion of this statutory obligation, however, would not preclude the complainant from filing a supplemental complaint to determine the actual amount of damages.⁸⁷⁹

334. With respect to imposition of a Title V penalty (e.g., forfeiture and fines) pursuant to section 271(d)(6)(A)(ii), we note that Title V provides for a separate process that is initiated

⁸⁷⁵ AT&T at 49; CompTel at 26; Excel at 14; LDDS at 29-30; MCI at 52; PacTel at 47; Sprint at 55, n.35; Teleport at 22; TIA at 49; TRA at 20; U S West at 59; USTA at 33. But see NYNEX at 64-65; SBC Reply at 32-33.

⁸⁷⁶ See, e.g., Sprint at 55 n.35; USTA at 34 n.14.

⁸⁷⁷ AT&T at 50; BellSouth at 35; CompTel at 28; Excel at 14 n.41; LDDS at 31; MCI at 53; Sprint at 58; TRA at 21.

⁸⁷⁸ AT&T Reply at 28 n.62 (stating that the suggestion that Congress would have chosen to reduce incentives for BOC compliance and leave injured parties uncompensated is absurd).

⁸⁷⁹ See 47 C.F.R. § 1.722.

by the issuance of a notice of apparent liability.⁸⁸⁰ We find, therefore, that the Commission's obligation under section 271(d)(6) is satisfied with respect to Title V penalties if, within 90 days (or longer if parties agree) of receiving a complaint, the Commission, upon finding a BOC liable for unlawful conduct, issues a notice of apparent liability pursuant to section 503.⁸⁸¹ Finally, we affirm our tentative conclusion that the Commission may make a determination that a BOC has ceased to meet the conditions for entry either in a proceeding commenced on its own motion or via the resolution of a complaint proceeding. We further find, as most commenters suggest, that the Commission is not bound by the 90-day time constraint when it initiates a proceeding on its own motion.

2. Legal and Evidentiary Standards

a. Background and Comments

335. We sought comment in the Notice on the legal and evidentiary standards necessary to establish that a BOC has ceased to meet the conditions required for its approval to provide in-region interLATA service.⁸⁸² The majority of commenters assert that prescribing the elements of every claim that could conceivably be brought before the Commission would, at this point, be a fruitless exercise.⁸⁸³ USTA maintains that, in order to invoke section 271(d)(6), the complainant's allegations and supporting proof must be of such character that, had it been presented prior to entry, the Commission would not have approved the BOC's application.⁸⁸⁴ Similarly, MCI contends that a complainant seeking section 271(d)(6) relief should state that the defendant BOC is no longer meeting the conditions for entry, cite the specific requirements the BOC is violating, and describe how it is violating them.⁸⁸⁵

b. Discussion

336. MCI and USTA correctly point out that section 271(d)(6) cannot be invoked unless the complainant alleges that the BOC has failed to meet the conditions of entry under section 271(d)(3). We conclude, however, that the procedural aspects of this showing are best addressed

⁸⁸⁰ See also *infra* at paragraph 355.

⁸⁸¹ 47 U.S.C. § 503(b); 47 C.F.R. § 1.80 *et seq.*; see also NYNEX at 74-75.

⁸⁸² Notice at ¶ 99.

⁸⁸³ Ameritech at 73; CompTel at 30; cf. Sprint at 57 n.38 (stating that it is not possible at this point to determine legal and evidentiary standards for the imposition of sanctions).

⁸⁸⁴ USTA at 34.

⁸⁸⁵ MCI at 53.

in our pending proceeding to adopt expedited complaint procedures.⁸⁸⁶ We agree with the majority of commenters and conclude that, beyond the duties and obligations discussed elsewhere in this Order, we need not establish at this time substantive rules that would define the specific legal elements of a claim that a BOC has failed or ceased to meet the conditions for entry under section 271(d)(3). Although we recognize that the establishment of substantive standards or "bright line" tests could assist in expediting the ultimate disposition of complaints invoking the 90-day statutory resolution deadline under section 271(d)(6), the conditions for entry include not only compliance with the section 272 requirements, but also satisfaction of the requirements of the competitive checklist in section 271(c)(2)(B), as well as a demonstration that the BOC application is consistent with the public interest, convenience, and necessity. Given the widely varying circumstances that may arise in the context of complaints alleging failure to meet the conditions of entry, we conclude that it is best to determine a BOC's compliance or noncompliance with these requirements on the basis of concrete facts presented in particular cases, rather than by substantive rule in this notice-and-comment proceeding.⁸⁸⁷

337. For these same reasons, we agree with a majority of the commenters that it would be impractical to prescribe specific evidentiary standards for establishing violations of all of the substantive requirements contained in the competitive checklist. Just as the circumstances that arise in the context of 271(d)(6) complaints are likely to vary from case to case, so too will the information necessary to prove or disprove allegations that the BOC has ceased to meet the conditions of entry. We note as a general matter that, consistent with the requirements of the APA, the Commission's practice in formal complaint proceedings pursuant to section 208 has been to determine compliance or noncompliance with the Act or the Commission's rules and orders according to a "preponderance of the evidence" standard of proof.⁸⁸⁸ Neither section 271 nor its legislative history prescribe a different standard of proof for establishing a BOC's failure to meet the conditions required for entry; we conclude, therefore, that this evidentiary standard applies equally to section 271(d)(6) complaints. In the paragraphs that follow, we address related

⁸⁸⁶ See Enforcement NPRM.

⁸⁸⁷ We expect to give content to the substantive requirements of the competitive checklist, for example, in the context of adjudicatory proceedings pursuant to section 271.

⁸⁸⁸ See, e.g., General Plumbing Corp. v. New York Telephone Co. and MCI, Memorandum Opinion and Order, DA 96-966 (Com. Car. Bur. rel. June 20, 1996). Proof by a preponderance of the evidence is applicable in most administrative and civil proceedings unless otherwise prescribed by statute or where other countervailing factors warrant a higher standard. See Sea Island Broadcasting Corp. v. FCC, 627 F.2d 240, 242 (D.C. Cir. 1980) ("The use of the 'preponderance of evidence' standard is the traditional standard in civil and administrative proceedings. It is the one contemplated by the APA, 5 U.S.C. § 556(d).", cert. denied, 449 U.S. 834 (1980); see also Grogan v. Garner, 498 U.S. 279, 285 (1991) (because the "preponderance of the evidence" standard results in roughly equal allocation of risks of error between litigants, the Supreme Court presumes that such a standard is applicable in civil actions between private litigants unless particularly important individual interests or rights are at stake). Generally, preponderance of the evidence means the "greater weight of evidence, evidence which is more convincing than the evidence which is offered in opposition to it." Hale v. Department of Transportation, 772 F.2d 882, 885 (Fed. Cir. 1985).

issues regarding what constitutes a prima facie showing that a BOC has ceased to meet one or more of the conditions for interLATA entry and whether the burden of proof should shift to the defendant BOC once the complainant makes such a showing. Notwithstanding the existence of a prima facie showing or any shift in the burden of production, as discussed below, to the extent that a complainant and defendant BOC differ over the material facts underlying a section 271(d)(6) complaint, the preponderance of evidence standard will guide our ultimate disposition of the complaint.

3. Prima Facie Standard

a. Background

338. We sought comment in the Notice on what constitutes a prima facie showing that a BOC has ceased to meet one or more of the conditions for interLATA entry. We asked parties to comment on whether it is enough for complainants invoking the expedited complaint procedures under section 271(d)(6)(B) to plead, along with proper supporting evidence, "facts which, if true, are sufficient to constitute a violation of the Act or Commission order or regulation" in order to establish a prima facie showing that the BOC has ceased to meet the conditions for approval in section 271(d)(3).⁸⁸⁹

b. Comments

339. Bell Atlantic, CompTel, LDDS, Sprint, Time Warner, and TRA all agree that a prima facie case can be made by pleading facts that are sufficient to constitute a violation of the Act, Commission order, or regulation.⁸⁹⁰ Bell Atlantic and Sprint observe, however, that, because a prima facie case will vary with each factual context, it is not possible to go further and define all the requirements for a prima facie case under various factual circumstances. NYNEX argues that simply permitting a complainant to allege facts without requiring the submission of "proper supporting evidence" constitutes a "serious denial of due process."⁸⁹¹ AT&T and MCI propose specific examples of BOC behavior that should be deemed sufficient to constitute prima facie showings that a BOC has ceased to meet the section 272 requirements.⁸⁹²

⁸⁸⁹ Notice at ¶ 100.

⁸⁹⁰ Bell Atlantic at 10 n.26; CompTel at 29; LDDS at 30; Sprint at 55-56; Sprint Reply at 36; Time Warner at 36-37; TRA at 21.

⁸⁹¹ NYNEX at 65-66; see also PacTel at 45; SBC Reply at 34.

⁸⁹² AT&T at 31, 35; MCI at 53-55.

c. Discussion

340. We conclude that complainants invoking the expedited complaint procedures of section 271(d)(6)(B) must plead, along with proper supporting evidence, facts which, if true, are sufficient to constitute a violation of the Act or Commission order or regulation in order to establish a prima facie showing that a BOC has ceased to meet the conditions for entry. Contrary to the suggestion of NYNEX and others, we did not propose in our Notice that it would be sufficient for a complainant to establish a prima facie case without the submission of "proper supporting evidence."⁸⁹³ Such a showing is not permissible under either our present pleading requirements or under the rules we propose in the Enforcement NPRM on expedited complaint procedures. Under our present rules, a formal complaint is required to include certain categories of information, including specific facts and legal authorities upon which the complaint is based.⁸⁹⁴ In addition, a formal complaint must identify or describe specifically and in detail the carrier conduct that forms the basis for the complaint as well as the nature of injury sustained.⁸⁹⁵ Further, in our Enforcement NPRM, we recently proposed to augment these requirements by requiring that a formal complaint include facts supported by relevant documentation or affidavits.⁸⁹⁶ Under our proposed rules, a complainant that fails to meet these pleading requirements may face either a dismissal of the complaint or a summary denial of the relief sought.⁸⁹⁷ Thus, in light of the pleading requirements that presently exist, as well as those proposed in the Enforcement NPRM, we reject allegations by some commenters that the prima facie standard we are adopting in this Order will violate the defendant's procedural rights, allow a complainant to file only a "bare notice-type complaint," or invite a flood of frivolous suits designed to harass the BOCs.⁸⁹⁸

341. We reject the recommendations of AT&T and MCI that we adopt specific criteria the complainant must demonstrate in order to establish a prima facie showing. As we stated above, beyond the legal and evidentiary standards established in this proceeding, it would be imprudent for us, at this time, to attempt to propose a comprehensive list of the showings that complainants will be required to make in order to demonstrate violations of the conditions of entry. Rather, we find it more appropriate to establish a generally applicable prima facie standard that is suitable for all complaints invoking section 271(d)(6), not just those alleging specific violations of the section 272 requirements.

⁸⁹³ See Notice at ¶ 100.

⁸⁹⁴ See 47 C.F.R. § 1.721.

⁸⁹⁵ 47 C.F.R. § 1.721(a)(6).

⁸⁹⁶ Enforcement NPRM at ¶¶ 37.

⁸⁹⁷ Id. at ¶ 85.

⁸⁹⁸ See NYNEX at 66; PacTel at 45; SBC Reply at 34.

4. Burden-Shifting and Presumption of Reasonableness

a. Background

342. In the Notice, we sought comment on whether the pro-competitive goals of the Act are advanced by shifting the ultimate burden of proof from the complainant to a defendant BOC, not just in complaints alleging discrimination under section 202(a), but in all complaints alleging that a BOC has ceased to meet any of the conditions for its approval to provide interLATA services under section 271(d)(3). We sought comment specifically on whether the burden should shift to the defendant BOC once the complainant makes a prima facie showing that a BOC has ceased to meet the conditions of section 271(d)(3).⁸⁹⁹

343. We also observed in the Notice that in complaints challenging the rates, terms, and conditions of non-dominant carrier service offerings under sections 201(b) and 202(a), the Commission has effectively established a rebuttable presumption that such rates and practices are lawful.⁹⁰⁰ We tentatively concluded that, in the context of complaints alleging that a BOC has ceased to meet the conditions required for the provision of in-region interLATA services, we will not employ a presumption of reasonableness in favor of the BOC or BOC affiliate, regardless of whether the BOC or BOC affiliate is regulated as a dominant or non-dominant carrier.⁹⁰¹

b. Comments

344. All BOCs and USTA oppose shifting the ultimate burden of proof to the defendant BOC after the complainant has established a prima facie case that the BOC has ceased to meet the conditions of entry.⁹⁰² BOCs assert, among other things, that shifting the burden of proof would violate due process and the APA, result in the filing of frivolous, anticompetitive complaints, and require them to prove a negative by continually demonstrating that they are not violating the conditions of entry. Some BOCs, however, support the idea of shifting the burden of producing evidence.⁹⁰³ All other commenters, including potential competitors, trade associations and DOJ, support shifting the burden of proof.⁹⁰⁴ In addition, most commenters,

⁸⁹⁹ Notice at ¶ 102.

⁹⁰⁰ See, e.g., Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79-252, First Report and Order, 85 FCC 2d 1, 31-33 (1980).

⁹⁰¹ Notice at ¶ 104.

⁹⁰² Ameritech at 74-75; Bell Atlantic at 10-11; BellSouth at 36-37; NYNEX at 70-72; PacTel at 42; SBC Reply at 34; U S West at 62; USTA at 36.

⁹⁰³ NYNEX at 66; PacTel Reply at 37-38; SBC Reply at 34.

⁹⁰⁴ See, e.g., AT&T at 50-51, CompTel at 29; DOJ Reply at 13-14; Excel at 14; ITAA at 28; LDDS at 30; MCI at 55; Sprint at 55-56; Teleport at 22; Time Warner at 37; TRA at 21.

including DOJ, agree with our tentative conclusion that the Commission should not employ a presumption of reasonableness in favor of the BOC or BOC affiliate in complaints alleging that a BOC has ceased to meet the conditions of entry.⁹⁰⁵

c. Discussion

345. For the reasons and in the manner discussed below, we conclude that the burden of production with respect to an issue should shift to the BOC after the complainant has demonstrated a prima facie case that a defendant BOC has ceased to meet the conditions of entry. As an initial matter, we note that the term "burden of proof" has historically been used to describe two separate but related concepts. First, it has been used to describe the burden of persuasion with respect to a particular issue which, under the traditional view, never shifts from one party to the other at any stage in the proceeding. Second, it has been used to describe the burden of going forward with evidence necessary to avoid an adverse decision on that issue. This burden may shift back and forth between the parties.⁹⁰⁶ Under the approach we adopt today, the burden of production or coming forward with evidence will shift to the defendant BOC once the complainant has established a prima facie case that the conditions of interLATA entry have been violated. In other words, the defendant BOC will have an affirmative obligation to produce evidence and arguments necessary to rebut the complainant's prima facie case or risk an adverse ruling. The complainant, however, will have the ultimate burden of persuasion throughout the proceeding; that is, to show that the "preponderance of the evidence" produced in the proceeding weighs in its favor. As explained more fully below, shifting the burden of production to the defendant BOC once a prima facie case has been made will require the party most likely to have relevant information in its possession to produce the information at an early stage in the proceeding.

346. Currently, in a typical complaint proceeding, the complainant has the burden of establishing that a common carrier has violated the Communications Act or a Commission rule or order.⁹⁰⁷ This burden of persuasion does not shift to the defendant carrier at any time in the proceeding.⁹⁰⁸ As Sprint observes, however, in view of the statutory mandate to resolve section

⁹⁰⁵ CompTel at 30; DOJ Reply at 15; LDDS at 30-31; MCI at 56; NYNEX Reply at 37 n.113; Teleport at 22; TRA at 22. But see PacTel at 46; SBC Reply at 34.

⁹⁰⁶ See Black's Law Dictionary 136 (Abridged 6th ed. 1991).

⁹⁰⁷ See generally, Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, Report and Order, 8 FCC Rcd 2614 (1993) (1993 Enforcement Order); 47 C.F.R. §§ 1.721 - 1.735.

⁹⁰⁸ In any complaint proceeding initiated under Section 208 of the Communications Act, the Commission, and the staff pursuant to delegated authority, may exercise discretion to require a defendant carrier to come forward with information or evidence determined to be in the sole possession or control of the carrier. See, e.g., General Services Admin. v. AT&T, 2 FCC Rcd 3574, 3576 n.31 (1987). In such cases, however, the burden of establishing a violation remains with the complainant.

271(d)(3) complaints in 90 days, the Commission must balance the need for expeditious resolution of the complaint against the need to develop a full record.⁹⁰⁹ We recognize, as do many commenters, that, even though some information may be publicly available, in many cases the BOC will be the sole possessor of certain information relevant to the disposition of the complainant's case. Our primary goal, as we expressed in the Notice, is to give full force and effect to the pro-competitive policies underlying section 271(d)(6) by ensuring the full and fair resolution of complaints challenging a BOC's compliance with the conditions for interLATA entry within the statutory 90-day period. We find that shifting the burden of production to the defendant BOC after a prima facie showing has been made by the complainant will facilitate our ability to reach this goal.

347. Further, as we observed in the Notice, effective enforcement of the conditions of interLATA entry, including the separate affiliate and nondiscrimination requirements of section 272, is critical to ensuring the full development of competition in the local and interexchange telecommunications markets. Many commenters argue that prompt enforcement of these conditions is essential not only to ensure the advent of true competition, but also to ensure that the BOCs take the conditions of entry seriously, particularly after they enter the in-region interLATA market. We conclude that shifting the burden of production to the BOC will facilitate the detection of anticompetitive behavior by the BOC and will enable us to adjudicate expeditiously complaints alleging violations of section 271(d)(3). Further, as mentioned above, in the context of a complaint proceeding, BOCs will have an affirmative obligation to produce all relevant evidence in their possession to rebut the complainant's claim or face an adverse ruling. Shifting the burden of production, therefore, may ultimately reduce the number of complaints filed against the BOCs by encouraging them to divulge exculpatory evidence before enforcement proceedings begin.

348. Many commenters that support shifting the burden of proof do not specify whether they advocate shifting the burden of persuasion or the burden of production. It is evident from the context of some comments, however, that a few commenters support a shift in the burden of persuasion, rather than a shift in the burden of production.⁹¹⁰ In response to these commenters, we find that most of the competitive concerns they raise in support of shifting the burden of persuasion are more than adequately addressed by shifting the burden of production.⁹¹¹ For example, some parties that advocate shifting the burden of persuasion argue that complainants frequently will require specific information that is within the exclusive possession of the BOC in order to substantiate their claim. These parties contend that requiring the complainant to

⁹⁰⁹ Sprint Reply at 31.

⁹¹⁰ See CompTel at 29; DOJ Reply at 13; LDDS at 30; MCI Reply at 32-33; Time Warner at 37; TRA at 21; see also Sprint at 55-57 (there is no way, absent discovery, to require a BOC to produce relevant evidence that is harmful to its case).

⁹¹¹ But see Sprint Reply at 34 (stating that it is unclear whether Commission means shift in burden of going forward or shift in burden of ultimate persuasion).

maintain the burden of proof would result in needless, extensive discovery, and shifting the burden will give BOCs the incentive to produce information necessary to resolve the complaint. We conclude that these concerns, as well as our goal of facilitating the full and fair resolution of claims alleging violations of the conditions of entry within the statutory 90-day period, are satisfied without requiring BOCs to prove a negative in order to avoid liability, i.e., to prove, by a preponderance of the evidence, that they did not violate the conditions of entry. Further, we find it unnecessary to address most of the BOCs' arguments against burden-shifting because they are directed against shifting the ultimate burden of persuasion rather than the burden of production.

349. We do find it necessary, however, to respond to Ameritech's argument that informational asymmetry between the complainant and defendant is best addressed in the context of the discovery process.⁹¹² Ameritech maintains that, if the Commission's discovery processes are too cumbersome, they ought to be reformed rather than replaced with burden-shifting.⁹¹³ Similarly, other commenters propose various procedural requirements that we might impose to enable us to resolve complaints within the 90-day statutory window.⁹¹⁴ Moreover, a few commenters suggest that Alternative Dispute Resolution may be another mechanism by which to facilitate resolution of complaints alleging a violation of section 271(d)(3).⁹¹⁵

350. In response to these arguments, we note that purpose of the Enforcement NPRM is to streamline our current procedures and pleading requirements so that we may expedite the processing of all formal complaints and resolve complaints within the deadlines imposed by the 1996 Act. We therefore find that it would be inadvisable to attempt to establish any new procedural rules in this proceeding. Moreover, as PacTel points out, we do not have an adequate record on which to base any such rules.⁹¹⁶ In response to Ameritech, we note that in the Enforcement NPRM we specifically proposed to reform our discovery process. Specifically, we sought comment on a range of options to eliminate or modify the discovery process, including prohibiting discovery as a matter of right, limiting the amount or scope of discovery, and allowing the state to set timetables for completion of discovery on an individual case basis.⁹¹⁷ By shifting the burden of production to the BOC after a prima facie showing has been made by the complainant, we are ensuring that information relevant to the complainant's claim is disclosed

⁹¹² Ameritech at 74-75.

⁹¹³ Id. at 74.

⁹¹⁴ See, e.g., AT&T at 51-52; New Jersey Division of Ratepayer Advocate at 4-5; NYNEX at 76; USTA Reply at 21-22.

⁹¹⁵ ATSI at 15-16; NYNEX at 76; PacTel Reply at 38. But see AT&T at 52-53 n.44 (Commission may not adopt any procedures that would delay its decision beyond 90 days).

⁹¹⁶ PacTel Reply at 38.

⁹¹⁷ Enforcement NPRM at ¶¶ 48-56.

early in the process, and thereby providing the Commission a sufficient record on which to make a decision, even in the potential absence of traditional discovery.

351. Finally, we affirm our tentative conclusion that, in the context of complaints alleging that a BOC has ceased to meet the conditions required for the provision of in-region interLATA services, we will not employ a presumption of reasonableness in favor of the BOC or BOC affiliate, regardless of whether the BOC or BOC affiliate is regulated as a dominant or non-dominant carrier. The presumption of lawfulness given to nondominant carrier rates and practices is employed in the context of complaints alleging violations of sections 201(b) and 202(b), where the complaint must demonstrate that the defendant's rates and practices are "unjust and unreasonable." We agree with MCI that a presumption of reasonableness is an irrelevant concept in the context of complaints alleging violations of the conditions of interLATA approval in section 271(d)(3), particularly given our interpretation of section 272(c)(1) as an unqualified prohibition on discrimination.⁹¹⁸

5. Enforcement Measures under Section 271(d)(6)(A)

a. Background

352. Section 271(d)(6)(A) provides that if, at any time after approval of a BOC application, the Commission determines that the BOC has ceased to meet any of the conditions of its approval to provide interLATA services, the Commission may, after notice and opportunity for a hearing: (1) issue an order to the BOC to "correct the deficiency;" (2) impose a penalty pursuant to Title V;⁹¹⁹ or (3) suspend and revoke the BOC's approval to provide in-region interLATA services.⁹²⁰

353. In the Notice, we tentatively concluded that we will follow the procedures set forth in Title V to impose Title V penalties, including forfeitures, under section 271(d)(6)(A). As to the non-forfeiture enforcement measures, we sought comment on whether the Commission should exercise its enforcement discretion and impose these sanctions on an individual case basis, or whether we should establish specific legal and evidentiary standards for each type of sanction. Further, we sought comment on the appropriate "notice and opportunity for a hearing" for the

⁹¹⁸ See MCI at 56.

⁹¹⁹ Pursuant to section 503(b)(1)(B), a person who "willfully or repeatedly" fails to comply with any of the provisions of the Communications Act or any rule, regulation, or order issued by the Commission under the Communications Act, is liable to the United States for a forfeiture penalty. Section 503(b)(2)(B) authorizes the Commission to assess forfeitures against common carriers of up to one hundred thousand dollars for each violation, or each day of a continuing violation, up to a statutory maximum of one million dollars for a single act or failure to act. In exercising such authority, the Commission is required to take into account "the nature, circumstances, extent, and gravity of the violation and, with the respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." 47 U.S.C. §§ 503(b)(1)(B), (b)(2)(B).

⁹²⁰ 47 U.S.C. § 271(d)(6)(A).

imposition of these non-forfeiture sanctions, both in the context of a complaint proceeding and on the Commission's own motion. We interpreted "opportunity for hearing" not to require a trial-type hearing before an Administrative Law Judge (ALJ).⁹²¹ We also tentatively concluded that Congress, by imposing a 90-day deadline for complaints, did not intend to afford the BOC trial-type hearings in enforcement proceedings pursuant to section 271(d).⁹²²

b. Comments

354. All commenters agree with our tentative conclusion to follow the Title V procedures to impose Title V penalties in enforcement actions alleging violations of the conditions of entry under section 271(d)(3). Commenters also agree that we should exercise our enforcement discretion and impose non-forfeiture sanctions on an individual case basis and should not attempt to establish specific legal and evidentiary standards for each type of sanction.⁹²³ AT&T proposes, however, that any sanction must ensure that the penalty for the misconduct exceeds any competitive benefit the BOC may have received as a result of the violation and that the BOC not be permitted to continue to provide long distance until it has corrected its violation.⁹²⁴ Commenters were generally split on the issue of whether "opportunity for hearing" requires a trial-type hearing before an ALJ prior to the imposition of a non-forfeiture sanction.⁹²⁵

c. Discussion

355. We affirm our tentative conclusion that we will follow the procedures set forth in Title V to impose Title V penalties in enforcement actions alleging violations of the conditions of entry under section 271(d)(3). As to non-forfeiture enforcement measures, we conclude that it is impractical, at this point in time, to prescribe the specific elements and factors that would warrant issuance of an order to "correct the deficiency" or an order suspending or revoking a BOC's approval to provide in-region interLATA service. We agree with AT&T that to do so would limit our remedial flexibility.⁹²⁶ Nor do we find it appropriate to establish specific evidentiary standards; rather, our determination of which non-forfeiture measure to impose will

⁹²¹ See 5 U.S.C. §§ 554, 556, 557.

⁹²² Notice at ¶ 106.

⁹²³ AT&T at 51; NYNEX Reply at 38 n.118; Sprint at 57 n.38.

⁹²⁴ AT&T at 51.

⁹²⁵ PacTel and USTA argue that a trial-type hearing for section 271(d)(3) violations will afford parties full due process rights and help resolve highly technical, complex matters. PacTel at 45; USTA at 37. AT&T, Excel, MCI, and Sprint agree that no trial-type hearings before an ALJ are required prior to imposition of non-forfeiture sanctions. AT&T at 50; Excel at 13 n.37; MCI at 57; Sprint at 56 n.37.

⁹²⁶ AT&T at 51.

depend on the specific facts and circumstances presented in a particular case. We find, nevertheless, that a BOC will have a full and fair opportunity to submit evidence and arguments challenging the imposition of a prescribed sanction within the statutory 90-day period.

356. We conclude that the phrase "opportunity for hearing" in section 271(d)(6)(A) does not require a trial-type hearing before an ALJ prior to the imposition of non-forfeiture enforcement measures. Although we recognize, as PacTel and USTA suggest, that hearings may be necessary to resolve material questions of fact, such as when oral testimony or cross-examination is required, we do not agree that trial-type hearings before an ALJ are required before the Commission imposes any non-forfeiture sanction.⁹²⁷ We find instead that, regardless of whether the Commission is imposing a non-forfeiture sanction in a proceeding commenced on its own motion or in the context of a complaint proceeding, the Commission can satisfy the hearing requirement of section 271(d)(6)(A) through written submissions rather than oral testimony.⁹²⁸ Finally, we affirm our tentative conclusion that Congress, by imposing a 90-day deadline for complaints, did not intend to afford BOCs trial-type hearings in all enforcement proceedings pursuant to section 271(d)(6)(B).

X. FINAL REGULATORY FLEXIBILITY CERTIFICATION

357. The Commission certified in the Notice that the proposed rules would not have a significant economic impact on a substantial number of small entities because the proposed rules did not pertain to small entities.⁹²⁹ Written public comment was requested on this proposed certification, and only one comment was received.⁹³⁰ For the reasons stated below, we certify that the rules adopted herein will not have a significant economic impact on a substantial number of small entities. This certification conforms to the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).⁹³¹

358. The RFA incorporates the definition of small business concerns set forth in 15 U.S.C. § 632 (small business concerns are independently owned and operated, not dominant in their field of operations, and meet any additional criteria established by the Small Business Administration (SBA)). The rules we adopt in this Order implement the non-accounting separate affiliate and nondiscrimination provisions of sections 271 and 272 of the Act, and will apply to

⁹²⁷ See 1993 Enforcement Order, 8 FCC Rcd at 2625-2626, ¶ 65; see also, e.g., Elehue Kawika Freemon and Lucille K. Freemon v. AT&T, Hearing Designation Order, 9 FCC Rcd 4032 (1994).

⁹²⁸ See AT&T at 50.

⁹²⁹ Notice at ¶ 165 (citing 5 U.S.C. § 605(b)).

⁹³⁰ National Telephone Cooperative Association Comments at 5-6.

⁹³¹ 5 U.S.C. § 601 *et seq.* SBREFA was enacted as Subtitle II of the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996).

the BOCs when they enter previously restricted markets. The Notice stated that, because BOCs are dominant in their field of operations, they are by definition not small entities and therefore no regulatory flexibility analysis is required.⁹³² We now note as well that none of the BOCs is a small entity because each BOC is an affiliate of a Regional Holding Company (RHC), and all of the BOCs or their RHCs have more than 1,500 employees.⁹³³ The order also clarifies the joint marketing restrictions that will apply to the nation's largest interexchange carriers for an interim period pursuant to section 271.⁹³⁴ The most recent data shows that only AT&T, MCI, and Sprint meet the statutory threshold.⁹³⁵ Moreover, these carriers are not small entities under the SBA definition because each has more than 1,500 employees.⁹³⁶

359. NTCA contends that small incumbent LECs should be considered small entities under the SBA's definition, and therefore, the basis of the proposed certification was incorrect.⁹³⁷ The certification contained in the Notice applied both to our proposed rules implementing sections 271 and 272 and to our proposed rules addressing LEC interexchange services. This Order implements only sections 271 and 272, and, as we have indicated, affects only the BOCs, AT&T, MCI and Sprint. NTCA's arguments concerning small incumbent LECs are not relevant to this Order, therefore, and will be addressed in a separate Order in this docket.

360. We therefore certify, pursuant to section 605(b) of the RFA, that the rules adopted in this order do not have a significant economic impact on a substantial number of small entities. The Commission shall provide a copy of this certification to the Chief Counsel for Advocacy of the SBA, and include it in the report to Congress pursuant to the SBREFA.⁹³⁸ The certification will also be published in the Federal Register.⁹³⁹

⁹³² Notice at ¶ 165.

⁹³³ Federal Communications Commission, CCB, Industry Analysis Division, Preliminary Domestic Information From Statistics of Communications Common Carriers, Tbl. 1.1 (July 1996).

⁹³⁴ Specifically, the Order implements the joint marketing restrictions of section 271(e), which apply to interexchange carriers that serve "greater than 5 percent of the nation's presubscribed access lines." See 47 U.S.C. § 271(e).

⁹³⁵ Federal Communications Commission, CCB, Industry Analysis Division, Long Distance Market Shares: Second Quarter, 1996, Tbl. 4 (Sept. 1996).

⁹³⁶ SBA regulations, 13 C.F.R. § 121.201, define small telecommunications entities in SIC Code 4813 (Telephone Communications Except Radiotelephone) as entities with fewer than 1,500 employees.

⁹³⁷ NTCA Comments at 5-6.

⁹³⁸ 5 U.S.C. § 801(a)(1)(A).

⁹³⁹ 5 U.S.C. § 605(b).

361. Report to Congress. The Commission shall send a copy of this FRFA, along with this Order, in a report to Congress pursuant to the SBREFA, 5 U.S.C. § 801(a)(1)(A). A copy of this FRFA will also be published in the Federal Register.

XI. FURTHER NOTICE OF PROPOSED RULEMAKING

A. Information Disclosure Requirements under Section 272(e)(1)

1. Background

362. Section 272(e)(1) states that BOCs "shall fulfill any requests from an unaffiliated entity for telephone exchange service and exchange access within a period no longer than the period in which it provides such telephone exchange service and exchange access to itself or to its affiliates."⁹⁴⁰ In the Notice, we sought comment on how to implement section 272(e)(1) and specifically inquired whether reporting requirements for service intervals analogous to those imposed by Computer III and ONA would be sufficient.⁹⁴¹ We concluded above, in Part VI.A, that specific public disclosure requirements are necessary to implement section 272(e)(1) effectively. We also noted that the record does not provide sufficient detail for us to determine whether the current ONA disclosure requirements are suitable for assessing compliance with section 272(e)(1), or whether another proposal, such as AT&T's proposed reporting requirements, would be a better approach.

2. Comments

363. AT&T, Teleport, and MCI support the imposition of reporting requirements to implement section 272(e)(1) and argue that the existing ONA installation and maintenance reporting requirements are insufficient.⁹⁴² AT&T suggests, for example, that the service interval reporting requirements established in the ONA proceeding measure average response times, and would not provide an adequate mechanism for determining whether a BOC is complying with section 272(e)(1).⁹⁴³

⁹⁴⁰ 47 U.S.C. § 272(e)(1).

⁹⁴¹ Notice at ¶ 85.

⁹⁴² AT&T at 36-37; Teleport Oct. 8 Ex Parte at 1; Letter from Frank W. Krogh, Appellate Counsel, Regulatory Law, MCI to William F. Caton, Acting Secretary, FCC at 1 (MCI Nov. 1 Reporting Ex Parte). Other parties also express dissatisfaction with ONA reporting. See e.g., Time Warner at 23.

⁹⁴³ AT&T at 36-37. According to AT&T, reliance on average response times allows a BOC to respond quickly to urgent requests of its affiliate and slowly to the less important requests of its affiliate, while doing the reverse for unaffiliated entities, thereby maintaining identical average response times for both entities, but discriminating against unaffiliated entities. Id.